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10/582,336

05/25/2007

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EXAMINER

INYARD, APRIL C

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/582,336	Applicant(s) KAKUDO ET AL.	
	Examiner APRIL C. INYARD	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-23 is/are pending in the application.
4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-23 is/are rejected.
- 7) ☒ Claim(s) 13 is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. ____.
 3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|-------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date <u>05/25/2007; 06/09/2006</u> . | 6) <input type="checkbox"/> Other: ____. |

DETAILED ACTION

Information Disclosure Statement

1. The information disclosure statement filed 05/25/2007 fails to comply with 37 CFR 1.98(a)(2), which requires a legible copy of each cited foreign patent document; each non-patent literature publication or that portion which caused it to be listed; and all other information or that portion which caused it to be listed. A copy of the Ryoze non-patent literature publication has not been received and therefore could not be considered.

Claim Objections

2. **Claim 13** is objected to because of the following informalities: The terminology "otsu-rui shochu" in Claim 13 is not defined in the claims. The Examiner interprets this to mean single distilled. Appropriate correction is required.

Claim Rejections - 35 USC § 112

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

4. **Claims 1-23** are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The claims are generally narrative and indefinite, failing to conform to current U.S. practice. They appear to be a literal translation into English from a foreign document and are replete with grammatical and idiomatic errors.

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Further, Claims 1, 2 and 23 recite the limitation toward a “material at least partly made of wheat/barley”, and Claim 11 recites the limitation toward “mugi shochu”, which Applicant defines as “shochu distilled from wheat/barley.” However, the Examiner first points out that “mugi” is understood to mean barley (according to a human Japanese translation). The Examiner next points out that Claim 10 defines the “wheat/barley” as barley **OR** wheat. It is therefore not fully understood whether Applicant intends for the shochu to be made of wheat OR barley, or both combined (wheat and barley). The Examiner interprets this to mean either based on Applicant's definition in paragraph [0061] and working Examples of the present disclosure, where the shochu used is derived from either wheat or barley. Claims 3-22 are rejected due to their dependency from Claims 1 and 2.

Claim 9 recites the limitation “raw material alcohol” as part of the Markush group. The Examiner finds this to be vague and indefinite as it is not fully understood what is included or excluded by this language.

Claim Rejections - 35 USC § 102

5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

6. **Claims 1-10, 16 and 23 are rejected under 35 U.S.C. 102(b) as being anticipated by Kitajima et al. (“Beer no Hanashi”, Gihodo Shuppan Co., Ltd., April 5, 1994 pp. 169-170;**

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references are to the translation provided by Applicant) as evidenced by Oono (US Pub 2005/0220935).

Kitajima teaches that there are many ways to enjoy beer which include making cocktails (*p. 6*). Cocktails may include mixing different kinds of beers (*p. 6*) in addition to mixing various kinds of beers with different kinds of liquors (*p. 7*). Kitajima specifically teaches the “Dog’s Nose” cocktail: 60 cc of gin into a mid-sized tumbler and fill the remainder with cold black beer; and that a real beer connoisseur knows to drink liquors such as whiskey, gin, quavit or shochu with beer as a chaser, which is known as the “Boiler Maker” type of beer cocktail, where trying such a mixture with beers of different flavors is taught (*p. 7*).

The first component taught by Kitajima is beer. The Examiner points out that beer is made by fermentation of starches derived from malted barley and wheat and is flavored by any variety of different hops. The Examiner additionally notes that beer is brewed using yeast, where sugars and other flavoring ingredients are added to the fermentation process, where hops may also be considered bittering agents. Therefore, the beer of Kitajima corresponds to component A, an alcohol-containing material partly made of wheat and/or barley and other starting materials.

The Examiner notes that the grain alcohols whiskey and gin are distillates grains commonly used such as wheat and/or barley. Therefore whiskey and gin are both at least partly made of wheat and/or barley. The Examiner further notes that shochu is a known Japanese distillate of grains that include wheat and barley. This corresponds to Applicant’s claimed component B.

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The Examiner therefore deems that the Japanese cocktail recipe for the “Dog’s Nose” and “Boiler Maker” as taught by Kitajima disclose the mixing of a malt fermented beverage (beer) and a distillate of an alcohol that is at least partly made of wheat and/or barley.

Therefore Kitajima teaches a malt fermented beverage that meets the limitations of **Claims 1-6**.

Regarding **Claims 7-8**, as discussed above Kitajima teaches a malt fermented beverage that contains two components, of which one component is beer.

As evidenced by Oono, Japanese Liquor Tax Law defines “beer” as something with a malt content equal to or greater than 66.7%, and falls under a higher tax, whereas sparkling malt liquor employs malt as part of raw materials and is divided into three categories: less than 25% by weight, 25-50% by weight, and 50-66.7% by weight of all raw material except water (*par. [0003]*).

As Kitajima teaches use of beer, the Examiner takes the position that Kitajima teaches a malt proportion of higher than 40%, because as evidenced by Oono, in order to be classified as beer, the malt content must be greater than 66.7%, which is greater than 20% and 40%, respectively.

Therefore, Kitajima meets the limitations of Claims 7-8.

Regarding **Claim 9**, Kitajima teaches that the second component B is whiskey, gin, or shochu, and therefore meets Applicant’s limitations as claimed.

Regarding **Claims 10 and 16**, as discussed above, Kitajima teaches that the second component is whiskey, gin or shochu, where the Examiner deems that barley or wheat are known starting grain materials. Therefore, Kitajima meets the limitations of the instant claims.

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Regarding **Claim 23**, Kitajima teaches a mixed drink cocktail made by mixing two components: beer, which corresponds to Applicant's claimed component A; and distilled grain alcohol (whiskey, gin, shochu), which corresponds to Applicant's claimed component B. Therefore Kitajima teaches a method for producing a malt fermented beverage as claimed.

7. **Claims 1-6, 9-15, and 21-23 are rejected under 35 U.S.C. 102(b) as being anticipated by Hoppy de Happy-to ("Hoppy de Happy Dokuhon", Kabushiki Kaisha Asupekuto; 22 August, 2000; pp. 30-35, references are to the translated pages) as evidenced by Oono (US Pub 2005/0220935) and Japanese Spirits (<http://www.jal.com/it/shochu/whats/jshochu.html>).**

Hoppy discloses that since 1948, a popular Japanese beverage known as "Hoppy" involves mixing twenty-proof shochu distilled Japanese liquor with Hoppy, a lower alcohol containing fermented malt beer-like beverage (*pp. 1-3*). The Hoppy is brewed in a manner similar to beer, made from a variety of barley grains, hops, yeast and water to produce a malt-fermented beverage (*p. 3*). Hoppy teaches that the mixing of the malt fermented Hoppy and shochu results in the generation of delicious froth, and thus teaches that Hoppy has a sparkling characteristic. Such mixing typically occurs in a mug marked with stars in order to help guide the consumer in mixing the two components, of which shochu is typically twenty five proof (*p. 2*) and Hoppy is about 0.8% alcohol (*p. 3*) in order to yield an alcohol content of about 3-8% overall (*p. 2*). However, Hoppy discloses that the drink may be enjoyed at any alcohol content the consumer desires (*p. 2*).

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The Examiner notes that shochu is known Japanese distilled liquor derived from grains that include wheat and barley. Therefore shochu is at least partly made of wheat and/or barley.

Regarding **Claims 1-4 and 23**, the Examiner considers the malt-fermented sparkling low-alcohol, "Hoppy" to correspond to Applicant's component A, as it is partly made of barley and produced by fermentation, and does contain 0.8% alcohol. The Examiner considers the shochu, known as Japanese liquor derived from a distillate of grains that include wheat and/or barley, to correspond to Applicant's component B.

Therefore, Hoppy discloses a malt fermented beverage that meets the limitations of Claims 1-4, and a method for producing a malt fermented beverage by mixing components A and B that meets the limitations of Claim 23.

Regarding **Claim 5**, Hoppy teaches that the "Hoppy" is made similarly to beer as discussed above. The Examiner takes the position that hops are known bittering agents, and as Hoppy teaches use of hops in the brewing of "Hoppy", the claim limitations are met. The Examiner also points out that as Hoppy teaches use of yeast in producing the malt-fermented beverage, yeast requires sugars for fermentation and deems that sugars are also part of the starting materials.

Regarding **Claim 6**, Hoppy teaches that the alcohol content of component A is 0.8%, is low in calories, and is inexpensive (*p* .2).

As evidenced by Oono, Japanese Liquor Tax Law defines "beer" as something with a malt content equal to or greater than 66.7%, and falls under a higher tax, whereas sparkling malt liquor employs malt as part of raw materials and is divided into three categories: less than 25%

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by weight, 25-50% by weight, and 50-66.7% by weight of all raw material except water (*par. [0003]*).

Given that “Hoppy” is 0.8% alcohol and is less expensive than beer, the Examiner takes the position that Hoppy does not qualify as a beer and therefore the malt content is inherently lower than 66.7%.

Thus, the Examiner takes the position that “Hoppy” thus qualifies as a sparkling malt liquor under the Japanese Liquor Tax Law, and is therefore a low-malt beer beverage which meets the limitations of the instant claim.

Regarding **Claims 9-11 and 14**, as discussed above, Hoppy teaches that the malt-fermented component A is mixed with shochu, which corresponds to Applicant's component B. The Examiner takes the position that shochu is a known Japanese distilled liquor derived from grains that include barley and wheat.

Regarding **Claims 12-13 and 15**, Hoppy discloses that type-A shochu is preferably paired with “Hoppy” due to the fact that it is drier than type-B shochu.

As evidenced by Japanese Spirits, type-A shochu is “Korui Shochu”, or a shochu that is distilled continuously in order to produce a high level of alcohol purity such that it is nearly tasteless and odorless; and type-B shochu is “Otsu-rui Shochu”, or shochu that is produced using traditional single or batch distillation to allow the drinker to enjoy the aroma and taste of the ingredients.

Therefore, Hoppy discloses both types of shochu: Type A (continuous) and Type B (batch/otsu-rui), where type A is more dry and pairs better with “Hoppy”.

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Additionally, these claim limitations are directed toward product-by-process limitations including “distilled in a batch distiller”, “ostu-rui shochu” (single distillation), and “distilled in a continuous distiller.”

Although Hoppy does not disclose the specific process of distillation for the shochu, it is noted the “[E]ven though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process”, *In re Thorpe*, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985). Further, “although produced by a different process, the burden shifts to applicant to come forward with evidence establishing an unobvious difference between the claimed product and the prior art product”, *In re Marosi*, 710 F.2d 798, 802, 218, USPQ 289, 292 (Fed. Cir. 1983). See MPEP 2113.

Therefore, absent evidence of criticality regarding the presently claimed (process) and given that Hoppy meets the requirements of the claimed composition, the shochu that corresponds to Applicant’s component B clearly meets the requirements of present claims.

Regarding **Claims 21-22**, as discussed above, Hoppy teaches the mixing of components A and B to produce a malt fermented beverage with a typical overall alcohol content in the range of 3 to 8%, and that this may be adjusted depending on the desired alcohol content. The alcohol content of the “Hoppy” is about 0.8%, and the shochu is about 25 proof. As the overall alcohol content of the mixture ranges from 3-8%, the Examiner deems that the volume ratio of the

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"Hoppy" (component A) to the shochu (component B) is encompassed by the Applicant's claimed ranges. Therefore, Hoppy meets the limitations of the instant claims.

Claim Rejections - 35 USC § 103

8. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

9. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

10. **Claims 5, 11, 14, and 16-18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kitajima or Hoppy as evidenced by Brewing Techniques: "Wheat Beer" (http://www.brewingtechniques.com/library/styles/1_1style.html).**

As discussed above, Kitajima and Hoppy each teach a malt fermented beverage that meets the limitations of Claims 1 and 2.

Regarding **Claim 5**, both Kitajima and Hoppy teach that component A is a malt-fermented alcohol-containing material made of at least malt, hops, and water.

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As both references teach that component A is carbonated, or brewed like beer, one having ordinary skill in the art would readily recognize that other starting materials commonly used in the brewing process include in the very least sugar and starches for the yeast, and bittering agents.

It would have therefore been obvious at the time the invention was made to one having ordinary skill in the art to modify the alcohol-containing fermented malt material component A as taught by either Kitajima or Hoppy by including additional starting materials known in the brewing art to result in a more robustly flavored beer-like product.

Regarding **Claims 11, 14, and 16**, as discussed above, Kitajima and Hoppy each teach mixing of component A with component B, where component B is the Japanese distilled liquor, shochu.

Neither Kitajima nor Hoppy specifically disclose that the shochu is specifically distilled from wheat and/or barley.

However, given that Kitajima and Hoppy each teach that component A is a malt-fermented beer-like material made from barley and wheat, one having ordinary skill in the art would recognize that mixing of such a material with another barley and/or wheat derived material would be complimentary.

Shochu made from barley and wheat is known in the art.

It would have therefore been obvious to one having ordinary skill in the art at the time the invention was made to modify component B of either Kitajima or Hoppy by specifically using a shochu derived from barley and/or wheat because depending on the content of barley and/or

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wheat in the component A (beer-like material), mixing of the two components will pair well and the flavor profiles will compliment each other.

Regarding **Claim 17**, Kitajima teaches that component A is beer, which as discussed above, under Japanese Liquor Tax means that the malt content is higher than 66.7%.

Kitajima does not specifically teach that the malt content of component A is 100% and that the shochu is a single distilled barley-derived shochu.

However, both of these alcohol-containing materials are known, and Kitajima teaches the generic use of beer (malt content >66.7%) and shochu.

Kitajima specifically teaches use of cold black beer, where such beer is known by the skilled artisan to have the highest malt content of all beers; and additionally teaches the mixing of distilled liquor with beers of different flavors (*p. 7*).

At the time of the invention, it would have been obvious to one having ordinary skill in the art to modify the mixture of beer and shochu taught by Kitajima by using a beer with a 100% malt content and a single distilled barley derived shochu given that these are both known varieties of the alcohol-containing materials taught by Kitajima.

Furthermore, Kitajima teaches use of black beer, which has the highest malt content of all beer. It would have therefore been obvious at the time the invention was made to one having ordinary skill in the art to substitute the generic shochu taught by Kitajima for a single distilled barely derived shochu, as this shochu is known for its true genuine aromas and tastes, which would pair well with the strong malty flavors of black beer.

Regarding **Claim 18**, as discussed above Kitajima specifically teaches use of black beer, but suggests that one tries mixing of various distilled liquors with different flavored beers.

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Malt fermented beer-like beverage materials having various malt contents are known in the art.

As evidenced by Brewing Techniques, one having ordinary skill in the art would recognize that wheat beers, which are primarily made of wheat malt, are known to have slightly less malt content than barley and rye malt containing beers, where the wheat malt is typically used in proportions of 40-60%.

It would have therefore been obvious at the time the invention was made to one having ordinary skill in the art to modify the mixture of components A and B in the cocktail recipes as taught by Kitajima by substituting wheat beer, which as evidenced by Brewing Techniques typically contains 40-60% wheat malt content, for the black beer because Kitajima teaches experimenting with different flavored beers.

It would have further been obvious to one having ordinary skill in the art at the time the invention was made to modify the mixture of components A and B in the cocktail recipes as taught by Kitajima by using a wheat derived shochu because depending on the type of alcohol-containing beer component A, proper pairing of the shochu flavors would be obvious, and it would be obvious to use a wheat derived shochu as component B to compliment use of a wheat beer as component A.

11. Claims 19-22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kitajima in view of Hoppy.

Regarding **Claims 19-20**, as discussed above, Kitajima teaches that one may try different flavored beers as component A.

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Kitajima fails to specifically teach the malt content of the different flavored beers.

However, as discussed above, Hoppy teaches use of a beer-like material that contains 0.8% alcohol, and is inexpensive, where the Examiner takes the position that Hoppy is thus a low-malt beer beverage and thus less than 66.7% malt under Japanese Liquor Tax Law. As Hoppy teaches that the alcohol content of the "Hoppy" is not more than 1%, and that "Hoppy" is low in calories, the Examiner deems that the malt content is low.

It would have therefore been obvious to one having ordinary skill in the art at the time the invention was made to modify component A taught by Kitajima by substituting one known beer for another beer-like sparkling beverage material as taught by "Hoppy", or by trying different flavored beers which will have different malt contents to produce a cocktail mixture that both compliments the flavors of the distilled liquor chosen for component B and the robustness of flavor desired by the consumer.

It would further be obvious to one having ordinary skill in the art at the time the invention was made to try using a low-malt material for component A because this will produce a cocktail that is less overwhelmingly strong in flavor and toasted sweetness, and will have fewer calories.

Regarding **Claims 21-22**, as discussed above Kitajima teaches mixing cocktails using beer as component A and distilled liquor as component B, either by mixing 60 cc of gin with cold black beer in a mid-size tumbler, or by drinking straight whiskey and chasing this with beer.

Kitajima does not specifically teach how much beer is mixed with the liquor, but the Examiner takes the position that the volume mixing ratios fall within the Applicant's claimed ranges.

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However, in an analogous art, Hoppy teaches the mixing of components A and B to yield a malt-fermented beverage with an overall alcohol content of 3-8%, where the alcohol content of components A and B are about 0.8% and 25 proof (12.5%), respectively. Hoppy also teaches that the volumetric ratio of the two components may be adjusted depending on the desired alcohol content the consumer wishes the beverage to have.

Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the volumetric ratios of components A and B as taught by Kitajima to be within the ranges as taught by Hoppy because this results in a malt-fermented beverage with an overall alcohol content of 3-8%.

Furthermore, given that Kitajima teaches that it is desirable for one to vary the types and flavors of components A and B, and that Hoppy teaches that one may vary the relative amounts of components A and B, it would have been obvious to one having ordinary skill in the art at the time the invention was made to adjust the volumetric amounts of components A and B in order to find the optimal ratio between the two that yields the best tasting mixture, since it has been held that the provision of adjustability, where needed, involves only routine skill in the art and that discovery an optimum value of a result effective variable involves only routine skill in the art. *In re Stevens*, 101 USPQ 284 (CCPA 1954); *In re Boesch*, 617 F.2d 272, 205 USPQ 215 (CCPA 1980).

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to APRIL C. INYARD whose telephone number is (571) 270-1245. The examiner can normally be reached on Monday - Thursday 8:00 AM - 5:00 PM EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, David R. Sample can be reached on (571) 272-1376. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/David R. Sample/
Supervisory Patent Examiner, Art Unit 1794

APRIL C INYARD /A. C. I./
Examiner, Art Unit 1794